Supreme Court, U.S.
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No. 93-884

In The

Supreme Court of the United States

October Term, 1993

JOAN PECK,

Petitioner,

v.

C.J. TEGTMEYER, M.D.

Respondent.

On Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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Respondent, Charles J. Tegtmeyer, M.D., respectfully requests this court deny petitioner's prayer that writ of certiorari issue in this matter.

QUESTION PRESENTED, JURISDICTIONAL BASIS AND STATUTE AND RULE INVOLVED

Respondent agrees with petitioner's characterization of the **QUESTION PRESENTED**, the **JURISDICTIONAL BASIS** of this action, and the **STATUTE AND RULE INVOLVED.**

STATEMENT OF THE CASE

The chronology of events is not in material dispute. Though respondent does not agree with petitioner's Statement of the Case concerning the inception and completion time of the arteriogram, that the cause of petitioner's back lesions is clearly established, and that there is no objective basis for calculation of the radiation administered, resolution of those matters is not essential to disposition of the issues before the court.

Petitioner's prayer for writ arises from the Fourth Circuit Court of Appeals' affirmation that petitioner's only named trial expert, David Marsden, an individual with a Master's Degree in radiation physics, was not qualified to establish the applicable medical radiology standard of care in Virginia.

Virginia, by statute, defines standard of care in a medical malpractice action as

> "that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice of specialty in this Commonwealth." Va. Code §8.01-581.20

The statute further prescribes that the standard of care in a particular instance is that which is testified to by a witness who

> "demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards . . . [and] has had an active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission . . . " Va. Code §8.01-581.20

The lower court concluded Marsden could not testify as to the applicable standard of care because he was not a radiologist, was not a physician, had not engaged in a clinical practice within one year of the care in question and did not profess any knowledge of the practice of radiology in Virginia.

ARGUMENT

1. THE DECISION OF THE LOWER COURT DID NOT DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Neither the decision of the District Court nor that of the Fourth Circuit concludes that Fed.R.Evid. 702 and Virginia Code §8.01-581.20 are mutually exclusive. Similarly, they do not conclude that the Federal Rule is inoperable in a Virginia medical malpractice action. These decisions simply recognize that the Federal rule is not so broad in its terms as to supplant Virginia's statute defining the manner of establishing standard of care in medical malpractice actions. Thus, while petitioner's proffered expert, David Marsden, might be qualified as an expert on issues of *causation* or *damages* under Fed.R.Evid. 702, Virginia Code §8.01-581.20 controls as to *medical standard*

of care and renders any opinion that Marsden might hold irrelevant.

The analysis of whether Federal or State law applies in a particular context has been outlined in a series of decisions by this court beginning with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The intent of *Erie* has been described as an effort to "insure that, in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464 (1945). State practice controls if it is "bound up with the rights and obligations created by state law in such a way that its application in the federal court is required." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535, 78 S.Ct. 893, 899 (1958).

Is the expert qualification provision in Virginia Code §8.01-581.20 "bound up with the rights and obligations created by state law in such a way that its application in the federal court is required"? *Id.* The rationale for an unequivocal affirmative response can be summarized as follows:

First, standard of care in medical malpractice cases in Virginia is established by examining the "reasonably prudent practitioner in the field of practice or specialty in this Commonwealth." Va. Code §8.01-581.20(A). More specifically, "what is [the] standard of care, whether it has been violated, and whether such violation is the proximate cause of plaintiff's injury . . . are all questions to be answered by state law in a diversity action," *Fitzgerald v. Manning*, 679 F.2d 341, 346 (4th Cir. 1982).

Second, standard of care in Virginia must be established by expert testimony. *Id.*

Third, the standard of care defined in the Virginia Medical Malpractice statute is that which is testified to by an expert qualified under the statute. An otherwise qualified witness who is offered to establish standard of medical care in Virginia must have expert knowledge of the standards of defendant's specialty; know what conduct conforms to those standards; be in active clinical practice within one year of the date at issue; and have a clinical practice in defendant's specialty or a related field of medicine. Va. Code §8.01-581.20. The statute forms a closed loop, comprised of mutually dependent segments which cannot be separated without disrupting the entire statutory structure and interfering with the public policy underpinning that structure.

Petitioner in this case, out of design or necessity, did not name any physician, let alone a radiologist familiar with the standard of care of the profession in Virginia. The courts below correctly ruled that a radiation physicist, a non-physician, could not establish the radiology standard of care as defined in the Virginia Medical Malpractice statute. Whatever qualifications Marsden may possess, his opinion as to a standard of care is irrelevant when measured against the State's requirements of proof. To have allowed petitioner to proceed to trial with an expert that could not establish the state defined standard of care would have violated the *Erie* twin aims of discouraging forum-shopping and avoiding inequitable administration of the law. It would have also resulted in the "undesirable results of discrimination in favor of noncitizens and prevention of uniformity in the administration of state law . . . " *Walker v. Armco Steel Corp.*, 446 U.S. 740, 745, 100 S.Ct. 1978, 1983 (1980).

Accordingly, the decision of the Fourth Circuit Court of Appeals to grant respondent's motion for summary judgment was fully consistent with prior applicable rulings of this court and therefore no writ should issue.

2. THE LOWER COURT'S DECISION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER.

Petitioner's prayer for writ cites the existence of several state medical malpractice standard of care statutory provisions. None of those statutes have resulted in federal litigation in which a decision contrary to the Fourth Circuit's decision in this case has been entered.

Fed.R.Evid. 601, cited by petitioner, played no role in the lower courts' analysis, therefore petitioner's reliance on other circuit disposition of witness competency is inapposite.

In short, there is no statutory or decisional authority on which a case can be made that this is a matter requiring the intervention of this court.

CONCLUSION

For the reasons summarized above, respondent respectfully asks that petitioner's request for writ of certiorari be denied

Respectfully submitted,

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